AUG 02 2010

No. 10-30

IN THE
SUPREME COURT OF THE UNITED STATES

JANE DOE, BY AND THROUGH HER GUARDIANS GREGORY AND MICHELLE JOHNSON, ET AL.

Petitioners,

v.

SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES, ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Table of Authorities ii

Reasons for Denying The Petition 1

I. The Fourth Circuit correctly ruled that the Respondent Debby Thompson is entitled to qualified immunity because a foster child's substantive due process rights were not clearly established in the Fourth Circuit at the time Thompson made placement decisions regarding Jane Doe. 1

II. The Petitioners' claimed split in the circuits over the substantive due process rights of a foster child is not a proper basis for the issuance of a writ of certiorari where the Petitioners prevailed on this issue in the Circuit Court. 7

Conclusion 9

TABLE OF AUTHORITIES

Cases

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989). 2, 3

Doe v. South Carolina Dept. of Social Services, 597 F.3d 163 (4th Cir. 2010). ..... passim

Hogan v. Carter, 85 F.3d 1113 (4th Cir. 1996). ... 6

Milburn v. Anne Arundel County Dept. of Social Services, 871 F.2d 474 (4th Cir. 1989). 3

Pearson v. Callahan, 129 S.Ct. 808 (2009). 6

Swanson v. Powers, 937 F.2d 965 (4th Cir. 1991). 6

Weller v. Department of Social Services for City of Baltimore, 901 F.2d 387 (4th Cir. 1990). 4

White v. Chambliss, 112 F.3d 731 (4th Cir. 1997). . 4

Wilson v. Layne, 526 U.S. 603 (1999). 6

REASONS FOR DENYING THE PETITION

I. The Fourth Circuit correctly ruled that the Respondent Debby Thompson is entitled to qualified immunity because a foster child's substantive due process rights were not clearly established in the Fourth Circuit at the time Thompson made placement decisions regarding Jane Doe.

In its decision, the Fourth Circuit recognized that a state owes a duty under the Fourteenth Amendment not to make a foster care placement that is deliberately indifferent to a child's right to personal safety and security. However, the Fourth Circuit further ruled that a foster child's substantive due process rights were not clearly established prior to the issuance of its opinion. As a result, the court affirmed summary judgment for the Respondent Debby Thompson based on qualified immunity. The Petitioners seek review in this Court of only that ruling.[1]

The Fourth Circuit explained its rationale in affirming qualified immunity as follows:

> [W]hen the placement decisions were made, there was no authority from the Supreme Court or this circuit that would have put Thompson on

[1] As the Fourth Circuit explained, the only claims that remained on appeal in that court were the substantive due process claims against the Respondent Thompson and the state law gross negligence claim against the South Carolina Department of Social Services (SCDSS). *See, Doe v. South Carolina Dept. of Social Services*, 597 F.3d 163, 168, n.1 (4th Cir. 2010). The Petitioners have now abandoned the claim by the adoptive parents who asserted a substantive due process right to the disclosure of a prospective adoptive child's history of sexual abuse. The Fourth Circuit reversed summary judgment and remanded the state law gross negligence claim, and that ruling is not at issue before this Court.

> fair notice that her actions violated Jane's substantive due process rights. On the contrary, given the precedents that did exist in our circuit on the issue of affirmative state protection of foster children, we think it quite reasonable for jurists and officials to have believed that we would have answered the *DeShaney* question in the negative and foreclosed the existence of such a right. In sum, because it would not have been apparent to a reasonable social worker in Thompson's position that her actions violated the Fourteenth Amendment, she is entitled to qualified immunity.

Doe v. South Carolina Dept. of Social Services, 597 F.3d 163, 177 (4th Cir. 2010).

The Fourth Circuit's analysis is correct and is not deserving of review on certiorari. As the court explains, there is no authority from this Court that specifically recognized a constitutional duty to protect a foster child in 2002 and 2003. The Petitioners cite to this Court's decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989); however, in that case this Court "expressed no view" on the issue at the heart of this litigation.

In *DeShaney,* a child was severely injured at the hands of his natural father. The defendant State was aware of the dangers to the child's safety but failed to remove him from his father's custody. This Court held that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197. This Court explained that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195. The purpose of the Due Process Clause "was to protect the people from the State, not to

ensure that the State protected them from each other." 489 U.S. at 196. In *DeShaney*, this Court concluded that social workers had no constitutional duty to protect the child against his father's violence.

In *DeShaney*, this Court raised a *possible* distinction where a child is removed by the State and placed in foster care. The Court questioned whether "the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents." 489 U.S. at 201, n.9. Yet, this Court ultimately "expressed no view" on whether foster care was analogous to incarceration or other forms of institutionalization that do give rise to an affirmative duty to protect. *Id.*

Therefore, contrary to the Petitioners' assertions, the *DeShaney* opinion cannot be read as affirmatively recognizing a duty to protect a foster child. Without question, this Court "expressed no view" and did not find that a state and its social workers owe a constitutional duty to protect a foster child from harm within the foster home. [2]

Importantly, that unanswered question from *DeShaney* was the subject of a trilogy of cases in the Fourth Circuit, none of which recognized a affirmative duty to protect foster children.

Beginning with the case of *Milburn v. Anne Arundel County Dept. of Social Services,* 871 F.2d 474 (4th Cir. 1989), the Fourth Circuit considered the constitutional claim of a child injured by his foster parents. The child's biological parents brought suit against the Department of Social Services and several of its employees alleging that they failed to adequately protect the child. The Fourth Circuit

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[2] The Fourth Circuit also recognized that *DeShaney* left this issue unanswered. *Doe*, 597 F.3d at 172 ("The *DeShaney* Court, however, expressly declined to decide the question").

found that the State could not be held liable for the abuse. Citing *DeShaney*, the court explained that the State had no affirmative constitutional duty to protect the child from private violence and further rejected the claim because the foster parents were private actors and not agents of the State. 871 F.2d at 479.

The Fourth Circuit later expanded the *Milburn* ruling in *Weller v. Department of Social Services for City of Baltimore*, 901 F.2d 387 (4th Cir. 1990). In *Weller*, the plaintiff alleged that the State harmed his minor child by failing to protect him from violence at the hands of the child's mother and grandmother. The plaintiff argued that the State created the danger that harmed his minor son because the state intentionally placed the child with these persons. The court found that just as harm suffered by a child at the hands of foster parents is not actionable as a violation of substantive due process, neither is harm inflicted by a parent or grandparent. The transfer of custody does not make the state a guarantor of a child's safety.

Later, the Fourth Circuit decided the case of *White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997). In that case, a minor child was involuntarily removed from the parent's custody and placed in a foster home where she ultimately died from abuse by the foster parents. The plaintiff asserted a substantive due process claim on behalf of a minor child against social workers with SCDSS alleging that the defendants improperly placed the child in a dangerous environment and failed to protect her safety while in foster care. The Fourth Circuit rejected both of these claims.

With respect to the placement claim, the court explained that "[a] negligent placement ... would implicate no federal rights for questions of negligence have long been regarded by the Supreme Court as within the province of state law." 112 F.2d at 737. While the court recognized that some circuits have concluded that deliberate indifference by a

social worker may implicate Fourteenth Amendment protections, the court did not adopt that reasoning. Instead, the court found no evidence of deliberate indifference and did not reach the question of what the clearly established law was on that issue. *Id.*

With respect to the protection claim, the Fourth Circuit definitively held that there was not a clearly established constitutional duty to protect a child from harm in foster care. The court explained that "[g]iven the state of this circuit's law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of [the child's] death." 112 F.2d at 738. The court thus reversed the district court's denial of qualified immunity for the SCDSS defendants.

Therefore, as the Fourth Circuit recognized, neither the *Milburn*, *Weller*, or *White* cases nor any other precedent clearly established a constitutional duty to protect at the time of the placements of Jane Doe in the present case. Indeed, the opposite was the case. The *Milburn*, *Weller*, and *White* cases explain that there is no constitutional right to protection from harm caused by a non state actor such as another foster child or a family member. It is quite telling that the Petitioners affirmatively requested in their brief to the Fourth Circuit that the decisions in *Milburn*, *Weller*, and *White* be overturned. That represents an acknowledgement that the rights that the Petitioners are asserting were not clearly established in the Fourth Circuit and indeed were contrary to existing precedent in the circuit.

Even more compelling are the decisions by other judges. In granting summary judgment on both prongs of the qualified immunity analysis, the district court ruled that "the Fourth Circuit has determined that children in foster care have no clearly established right to affirmative state protection." (App. 67). The Fourth Circuit subsequently

found that the district court's interpretation of *DeShaney*, *Milburn*, *Weller*, and *White* to be reasonable although ultimately the Fourth Circuit disagreed with that interpretation. *Doe*, 597 F.3d at 176. Moreover and perhaps most importantly, the decision of the Fourth Circuit was not unanimous. The panel found the existence of a constitutional duty to protect only by a 2-1 decision. Judge Wilkinson disagreed "with the view that the Constitution imposes upon states a 'duty to protect' children from harm by non-state actors in foster homes." *Doe*, 597 F.3d at 180. (Wilkinson, J. dissenting) He indeed described the majority opinion as "fashioning" a "new substantive due process right." *Id.*

In *Wilson v. Layne*, 526 U.S. 603 (1999), this Court held that "[i]f judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." 526 U.S. at 618. *See also*, *Pearson v. Callahan*, 129 S.Ct. 808, 823 (2009). Likewise, the Fourth Circuit has held:

> Although there might be instances where a reasonable jurist, but not a reasonable official, would consider particular conduct violative of clearly established law, if a reasonable jurist would not have viewed the defendant's action as violative of clearly established law, then it necessarily follows that the reasonable officer likewise would not have viewed that conduct as violative of clearly established law.

Hogan v. Carter, 85 F.3d 1113, 1116 (4th Cir. 1996). *See also*, *Swanson v. Powers*, 937 F.2d 965, 968 (4th Cir. 1991) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

Thus, the fact that the district court as well as Judge Wilkinson did not recognize the existence of a constitutional right to protection is sufficient to entitle Debby Thompson to qualified immunity. The simple fact that experienced and accomplished federal jurists do not agree on what the law required is indicative that the law was not clearly established in 2002 and 2003. As this Court explained in *Wilson*, it is unfair to hold government officials liable where jurists cannot even agree as to the legal duties or responsibilities that govern their conduct.

In short, the Fourth Circuit correctly ruled that Thompson is entitled to qualified immunity. That ruling is not novel or unprecedented or controversial. Nor will that ruling have any affect on future cases. From this point forward, the law within the Fourth Circuit is clearly established. Quite simply, the qualified immunity ruling does it warrant the review by this Court on certiorari.

II. The Petitioners' claimed split in the circuits over the substantive due process rights of a foster child is not a proper basis for the issuance of a writ of certiorari where the Petitioners prevailed on this issue in the Circuit Court.

In support of their contention that a writ of certiorari should be issued in this case, the Petitioners argue that there is a split in the circuits as to whether a foster child is entitled to substantive due process protections when placed in an unsafe or harmful foster care environment. The Petitioners point out that a majority of circuits have recognized substantive due process protections for foster children.

Prior to the decision by the Fourth Circuit in the case at bar, the Fourth Circuit had not recognized that a state owed a Fourteenth Amendment duty to protect foster children from harm within a foster home. Indeed, a trilogy of cases, as

discussed above, had been interpreted as rejecting such a claim. However, this is no longer an open or unsettled question in the Fourth Circuit. As the Petitioners fully concede, in the present case, the Fourth Circuit now holds as follows:

> [W]hen a state involuntarily removes a child from her home, thereby taking the child into its custody and care, the state has taken an affirmative act to restrain the child's liberty, triggering the protections of the Due Process Clause and imposing "some responsibility for [the child's] safety and general well-being." Such responsibility, in turn, includes a duty not to make a foster care placement that is deliberately indifferent to the child's right to personal safety and security.

Doe v. South Carolina Dept. of Social Services, 597 F.3d 163, 175 (4th Cir. 2010).

Therefore, while there may still be a minority of circuits that have not expressly recognized a foster child's rights to substantive due process protections, that is no longer a justiciable issue in this case. This case involves the existence of such a legal duty within the Fourth Circuit. The Fourth Circuit now has joined the majority of its sister circuits and recognizes the very duty that that the Petitioners have asserted. This issue was resolved in the Petitioners' favor and is no longer at issue. Hence, the Petitioners cannot claim some split in the circuits as a basis for seeking a writ of certiorari. This case does not present a justiciable claim in that regard.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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